(2011) 06 MAD CK 0484

In the Madras High Court

Case No : Tax Case (Revision) No. 1045 of 2006

San Construction Company (Pvt.) Ltd. APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12(2), 12(3), 12(3)(b), 12(5)(iii)

Citation : (2012) 53 VST 130

Hon'ble Judges : P.P.S. Janarthanaraja, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : S. Ramanathan, for the Appellant; R. Sivaraman, Special Government Pleader (Taxes), for the Respondent

Judgement

Chitra Venkataraman, J.—The assessee is on appeal as against the order of the Tribunal, raising the following substantial questions of law: (i) Whether the addition of freight charges and gross profit added to the purchase turnover which was culled out from the books of accounts would amount to best judgment assessment so as to attract penalty u/s 12(3)(b) of the Act?

(ii) Whether the decision of the honourable. Supreme Court reported in The State of Madras Vs. S.G. Jayaraj Nadar and Sons, in the case of Appollo Saline Pharmaceuticals (P) Ltd. Vs. Commercial Tax Officer (FAC) and Others, in the case, of Appollo Saline Pharmaceuticals (P) Limited v. Commercial Tax Officer (FAC), is applicable to the present case as the turnover has been estimated based on the figures available in the books of accounts?

(iii) Whether the addition of freight charges and gross profit added to the turnover as per books made in the original assessment would amount to revision of assessment u/s 16 of the Act or best judgment assessment u/s 12(3) of the Act and whether penalty u/s 16 or u/s 12(3) is leviable?

The assessment year under consideration, is 1994-95. The assessee herein is a building contractor. On July 27, 1995, there was an inspection in the business place of the assessee. The inspection revealed that the assessee had effected purchases from unregistered dealers as well as inter-State purchases. Based on the results, the original assessment was sought to be revised u/s 16 of the Tamil Nadu General Sales Tax Act resulting in an addition of turnover under the head of sand and brick, apart from including freight charges in the total turnover. Although the reassessment order stated that penalty u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act would be levied separately, evidently, no such notice was issued. However, the order of reassessment revealed levy and penalty u/s 12(3) of the Tamil Nadu General Sales Tax Act to the tune of Rs. 21,240. Aggrieved by the order of the assessment, the assessee went on appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner agreed with the assessee that while levying penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act, the officer had not mentioned, any reason for levy of penalty. However, there was no wilful suppression on the part of the assessee, to justify the levy of penalty. Thus, even though there was no findings for the levy of penalty and that the penalty was levied u/s 12(3) instead of considering the same as per section 16 of the Tamil Nadu General Sales Tax Act, on merits, the Appellate Assistant Commissioner allowed the appeal and cancelled the levy of penalty.

2. Aggrieved by the same, the State preferred an appeal before the Tamil Nadu Sales Tax Appellate Tribunal. In paragraph 10 of the order, the Tribunal pointed out that the inspection on July 27, 1995 revealed purchases from unregistered dealers as well as inter-State purchases. The sale value of these purchases was estimated after adding the transportation charges and the assessee could not produce the relevant documents to sustain its claim and thereby contradict the findings of the inspecting officers. In the circumstances, it was clear that the purchase suppression was not accounted for in the books. The Tribunal pointed out that even though the assessment was one u/s 12(2) of the Tamil Nadu General Sales Tax Act and the deletion of penalty was done by the Appellate Assistant Commissioner holding that there was no wilful suppression, taking the view that the best judgment assessment attracted the penal provisions, the Tribunal set aside the order of the Appellate Assistant Commissioner and thereby restored the penalty levied. Aggrieved by the same, the present revision has been filed by the assessee.

3. The learned counsel appearing for the appellant pointed out that going by the reassessment proceedings u/s 16 of the Tamil Nadu General Sales Tax Act, unless the assessing officer records a definite finding as to the wilfulness on the suppression of turnover, penalty could not be sustained. He drew our attention to the provisions of section 16 of the Tamil Nadu General Sales Tax Act, which states that unless and until the officer is satisfied that the escapement from assessment revealed wilful non-disclosure of the assessable turnover, the levy of penalty, as such, could not be sustained.

4. Per contra, learned Special Government Pleader (Taxes) appearing for the Revenue supported the order of the Tribunal that given the fact that the turnover was assessed consequent on the inspection results, no exception could be taken to the levy of penalty.

5. Heard the learned counsel appearing for both sides and perused the materials placed on record.

6. A reading of the order of the Deputy Commercial Tax Officer dated July 23, 1997 shows that except for giving the basis for making the assessment, there is hardly any issue considered as regards the levy of penalty consequent on the reassessment proceedings. It is trite law that once the original assessment has been revised, the reassessment order effaces the effect of the first assessment. If in a reassessment proceedings, the assessing authority proceeds to impose penalty, it could only be in accordance with the provisions u/s 16(2) of the Tamil Nadu General Sales Tax Act, which reads as follows:

16. Assessment of escaped turnover.--(1)....

(2) In making an assessment under clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under clause (a) of sub-section (1), by way of penalty, a sum which shall be--

(a) fifty percent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten percent of the tax paid as per the return;

(b) One hundred percent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten percent but not more than fifty percent of the tax paid as per the return;

(c) One hundred and fifty percent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty percent of the tax paid as per the return;

(d) One hundred and fifty percent of the tax due on the assessable turnover that was wilfully not disclosed, in the case of self-assessment referred to in sub-section (1) of section 12:

Provided that no penalty under this sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

7. As already pointed out, the order of assessment stated that penalty u/s 12(5)(iii) would be levied separately as per the Act. However, towards the end of the order, it merely recited the penalty levied as u/s 12(3) of the Act at 100 percent of the tax due, amounting to a sum of Rs. 21,240. Thus, without satisfying himself as to whether the turnover which was not offered for assessment was

wilfully suppressed, on a mere ground that the assessment had been made on a best of judgment basis, the penalty was levied u/s 12(3) of the Tamil Nadu General Sales Tax Act. As rightly pointed out by the learned counsel appearing for the assessee, even assuming that the reference u/s 12(3) of the Tamil Nadu General Sales Tax Act was a wrong reference of the statutory provisions, yet, one cannot lose sight of the fact that the levy of penalty u/s 16(2) of the Tamil Nadu General Sales Tax Act rests on a definite finding of wilful non-disclosure of the taxable turnover. It is not denied by the Revenue that the assessment made on the assessee is one falling u/s 16 of the Tamil Nadu General Sales Tax Act, in which event, the proper provision which one has to have recourse to for review of penalty is section 16. In the above circumstances, rightly the Appellate Assistant Commissioner held that in the absence of any definite finding on wilful suppression, the levy of penalty could not be sustained.

8. A reading of the order of the Tribunal shows that it misdirected itself in treating the assessment as one u/s 12(2) of the Tamil Nadu General Sales Tax Act. When it is not the case of the Department that the assessment was made u/s 12(2) but one u/s 16 as a case of reassessment, we fail to understand how the Tribunal considered the assessment as falling u/s 12, to sustain the penalty'' u/s 12(3). Considering the fact that the levy of penalty does not satisfy the requirement of section 16(2) of the Tamil Nadu General Sales Tax Act, we have no hesitation in setting aside the order of the Tribunal. It is also relevant to note that the levy of penalty is discretionary and not an automatic concomitant of reassessment.

9. As far as section 16(2) proceedings are concerned, in the absence of consideration of any materials therein as to the wilful non-disclosure of assessable turnover, we do not find any ground to affirm the view of the Tribunal. In the result, the question is answered in favour of the assessee, the order of the Tribunal stands set aside and the tax case stands allowed. No costs.